



Billing Code 6325-63-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206-AM86

Federal Employees Health Benefits Program Expansion of Eligibility to Certain Employees on Temporary Appointments and Certain Employees on Seasonal and Intermittent Schedules

AGENCY: Office of Personnel Management.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Office of Personnel Management (OPM) is issuing a proposed rule that would expand eligibility for enrollment under the Federal Employees Health Benefits (FEHB) Program to certain temporary, seasonal, and intermittent employees who are identified as full-time employees. This regulation would make FEHB coverage available to these newly eligible employees no later than January 2015.

DATES: OPM must receive comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Send written comments to Louise Yinug, Senior Policy Analyst, Planning and Policy Analysis, U.S. Office of Personnel Management, Room 3415, 1900 E Street NW, Washington, DC; or FAX to (202) 606-0036 Attn: Louise Yinug. You may also submit comments using the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Louise Yinug, Senior Policy Analyst at (202) 606-0004.

SUPPLEMENTARY INFORMATION:

OPM is proposing to expand eligibility for coverage under the Federal Employees Health Benefits (FEHB) Program to certain temporary, seasonal, and intermittent Federal employees who are expected to work full-time schedules within the meaning of section 4980H of the Internal Revenue Code (IRC) for at least 90 days.

This proposed rule would expand eligibility by authorizing enrollment in a FEHB health plan for certain Federal employees on temporary appointments and certain employees working on seasonal and intermittent schedules. Currently, most employees on temporary appointments become eligible for FEHB coverage after completing one year of current continuous employment and, once eligible for coverage, do not receive an employer contribution to premium. Employees working on seasonal schedules for less than six months in a year and those working intermittent schedules are excluded from eligibility regardless of the work hours for which they are expected to be scheduled. Some limited exceptions were made to these exclusions for temporary firefighters and emergency response workers in 5 CFR 890.102(h) and (i).

Under this proposed regulation, employees on temporary appointments, employees on seasonal schedules who will be working less than six months per year, and employees working intermittent schedules would be eligible to enroll in a FEHB health plan if the employee is expected to work a full-time schedule of 130 or more hours in a calendar month. If the employing office expects the employee to work at least 90 days, the employee is eligible to enroll upon notification of the employee's eligibility by the employing office. If the employing office expects the employee to work fewer than 90 days, the employee will be eligible to enroll after the completion of a 90 day waiting period. Temporary, seasonal, and intermittent

employees who are expected to work a schedule of less than 130 hours in a calendar month would not be eligible to enroll in a FEHB health plan. Temporary, seasonal, and intermittent employees for whom the expectation of hours of employment changes from less than 130 hours per calendar month to 130 hours or more per calendar month would become eligible to enroll in an FEHB health plan as described above.

The change in eligibility for coverage set forth in this proposed regulation is intended to ensure, to the greatest extent practicable, that full-time employees, within the meaning of section 4980H of the IRC and Treasury regulations thereunder (79 FR 8544, February 12, 2014) are eligible to enroll in FEHB. IRC section 4980H, enacted as part of the Affordable Care Act, defines a full-time employee as, with respect to any month, an employee who is employed on average at least 30 hours of service per week (IRC section 4980H(c)(4)). Under the IRC section 4980H regulations a full-time employee means, with respect to any calendar month, an employee who is employed at least 130 hours of service in that month.

This proposed rule would allow newly eligible employees (employees on an appointment limited to one year and employees working on a seasonal or intermittent schedule) to initially enroll under the FEHB program with a Government contribution to premium if they are expected to be employed on a full-time schedule and are expected to work for at least 90 days.

Some temporary employees who have completed one year of continuous employment are already eligible for FEHB coverage but without a Government contribution to premium. This proposed rule would allow these employees to enroll in a FEHB plan under 5 CFR 890.102(j) (with a Government contribution to premium) if the employee is determined by his or her employing office to be newly eligible for FEHB coverage under this regulation.

Enrollments for employees newly eligible pursuant to this rule would be accepted during a 60-day period after the employing office notifies employees of their eligibility to enroll in a FEHB health plan. Coverage will become effective as provided for by 5 CFR 890.301. Employing offices must promptly determine eligibility of new and current employees and upon determining eligibility, promptly offer employees an opportunity to enroll in the FEHB Program so that coverage becomes effective no later than January 2015.

While this proposed regulation would expand FEHB coverage to new categories of Federal employees, there are other employers who are entitled to purchase FEHB coverage for their own employees or whose employees are otherwise entitled to enroll in FEHB coverage. These other employers may have made or are planning to make other arrangements to provide health insurance for their temporary, seasonal, and intermittent employees. Accordingly, the OPM Director may waive application of this proposed rule when the employer of an individual not covered by 5 U.S.C. 8901(1)(A) demonstrates to OPM that these expansion requirements would have an adverse impact on the employer's need for self-governance. We expect such instances to be rare.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only adds to the list of groups eligible to enroll under the FEHB Program.

Executive Orders 13563 and 12866, Regulatory Review

OPM has examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993) and Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects (\$100 million or more in at least one year). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more in at least one year or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866.

As shown in the analysis that follows, the economic impact of this rule is projected to fall below the \$100 million threshold. Although not economically significant, this rule has been determined to be a “significant regulatory action” under section 3(f)(4) and thus has been

reviewed by the Office of Management and Budget in accordance with Executive Orders 13563 and 12866.

Baseline FEHB Eligibility and Federal Government Employer Responsibility

If finalized, this proposed rule would expand eligibility to enroll in a FEHB plan to certain temporary, seasonal, and/or intermittent employees who are identified as working full-time. In order to estimate rule-induced impacts, it is necessary to assess the number of full-time Federal employees who are not currently eligible to participate in the FEHB program or are not currently eligible to have the government pay a portion of their premium, and thus may be affected by the proposed rule.

The following categories of Federal employees are either excluded by regulation from participating in the FEHB Program or are not currently eligible to have the government pay a portion of their premium:

- Temporary employees with less than a year of service. Per OPM regulations, most of these individuals are not eligible to enroll in FEHB. In 2012 OPM published a regulation extending FEHB eligibility to certain temporary firefighters and some personnel performing emergency response functions.
- Seasonal employees. Seasonal employees working six months or fewer are generally prohibited by regulation from enrolling in FEHB.
- Intermittent employees. Intermittent employees are generally prohibited by regulation from enrolling in FEHB. In 2012, however, OPM published a regulation extending FEHB eligibility to certain intermittent employees engaged in emergency response and recovery work.

- Temporary employees with more than a year of service. Per statute, these employees can enroll in an FEHB plan if they pay the entire premium with no Government contribution.

OPM has worked with Federal payroll providers to assess how many full-time Federal employees are without access to FEHB. The data show that all responding executive agencies have a small number of full-time employees (as defined in Section 4980H of the IRC) without access to FEHB. The number without access varies from agency to agency. Within agencies, the number varies from month to month. Some large departments hire full-time temporary or seasonal employees only for a few months of the year.

The agencies included in our data, in aggregate, offer FEHB to at least 95 percent of full-time employees (and their dependents) for all months. Across civilian, non-Postal, executive agencies and all months of the year, our data indicate that there are 300,000 full-time employee-months currently ineligible for FEHB (0.9 to 2 percent of the Federal workforce).

The Federal government and its agencies are subject to employer shared responsibility like other applicable large employers. The employer shared responsibility payments only apply if a full-time employee (defined as an employee with 130 hours of service in a month) receives a premium tax credit in connection with the purchase of health insurance through an Exchange. We do not know whether the full-time Federal employees not yet eligible for FEHB would, in the absence of this rule, be eligible for premium tax credits in connection with coverage purchased on an Exchange because we lack information on other available sources of health coverage or household income. Even in the extremely unlikely case that all 300,000 employee-months without FEHB are eligible to receive a premium tax credit in connection with coverage purchased on an Exchange, the total assessable payment incurred by the Federal agencies would

be well below the threshold for economic significance, which is \$100 million.¹ While we expect that agencies will be in compliance with the employer shared responsibility provision without this proposed rule, we are undertaking the FEHB expansion regardless to even out rules across different types of workers.

Impacts of the Proposed Rule

Agencies may incur FEHB expansion costs; a rough quantification of these potential costs appears below.

We do not know how many individuals without an offer of FEHB, which varies widely from month to month, would enroll in FEHB if it were available. Our similar recent regulations expanding FEHB coverage to certain temporary firefighters and disaster recovery workers resulted in very limited take-up, ranging from approximately 10 to 20 percent. We estimate, using enrollment-weighted averages, that FEHB coverage currently costs the government about \$700 per full-time worker per month for affected agencies.² Given this average cost estimate, if those currently without FEHB eligibility become eligible and the portion of newly eligible employees who enroll is between 10 and 20 percent, this expansion would generate costs to the Federal government of well below the threshold for economic significance, which is \$100 million.

The premium payments newly made by the Federal government are appropriately categorized as costs to society if rule-induced increases in FEHB enrollment would be associated with providing additional medical services to newly-enrolled individuals. To the extent that increases in enrollment do not change how society uses its resources, then premium payments by the government would instead be transfers between members of society. Recipients of these

¹ The relevant employer payment would be \$250 per month (or \$3,000 per year), as indexed, only for those full-time employees who receive a premium tax credit in connection with coverage purchased on an Exchange.

² This estimate includes FEHB premium payments but not administrative costs to employing agencies.

transfers could include newly-enrolled individuals, if they would have paid (or paid more) for medical services or for health insurance premiums in the absence of the rule, or providers and charities, if the effect of the rule is a decrease in uncompensated care.

We lack exact data to quantify rule-induced public health benefits or to refine our estimates of costs and transfers. We therefore request comments on any of this proposed rule's impacts.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Parts 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.

Katherine Archuleta,
Director.

Accordingly, OPM proposes to amend title 5, Code of Federal Regulations as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for Part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111-03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104-106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110-279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c-1; subpart L also issued under sec. 599C of Pub. L. 101-513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105-33, 111 Stat. 251; and section 721 of Pub. L. 105-261, 112 Stat. 2061.

2. Section 890.102 is amended by adding paragraphs (j) and (k) to read as follows:

§ 890.102 Coverage.

* * * * *

(j)(1) Notwithstanding paragraphs (c)(1), (2), and (3) of this section, an employee working on a temporary appointment, an employee working on a seasonal schedule of less than six months in a year, or an employee working on an intermittent schedule, for whom the employing office expects the total hours in the regularly scheduled administrative workweek plus hours of irregular or occasional overtime work to be at least 130 hours per calendar month, is eligible to enroll in a health benefits plan under this part as follows:

(i) If the employing office expects the employee to work at least 90 days, the employee is eligible to enroll upon notification of the employee's eligibility by the employing office, and

(ii) If the employing office expects the employee to work fewer than 90 days, the employee will be eligible to enroll after the completion of a 90 day waiting period.

(2) An employee working on a temporary appointment, an employee working on a seasonal schedule of less than six months in a year, or an employee working on an intermittent schedule for whom the employing office expects the total hours in the regularly scheduled administrative workweek plus hours of irregular or occasional overtime work to be less than 130 hours per calendar month is generally ineligible to enroll in a health benefits plan under this part. If the expectation of hours of employment changes to 130 hours or more per month, that employee is eligible to enroll in a health benefits plan under this part as described in paragraph (j)(1) of this section.

(3) Once an employee is enrolled under paragraph (j) of this section, eligibility will not be revoked, regardless of his or her actual work schedule or employer expectations in subsequent years, unless the employee separates from Federal service or receives a new appointment (in which case eligibility will be determined by the rules applicable to the new appointment).

(4) For purposes of paragraph (j) of this section, a regularly scheduled administrative workweek includes hours of paid leave and hours of leave without pay for purposes of taking leave under the Family Medical Leave Act under 5 U.S.C. chapter 63, subchapter V, for performance of duty in the uniformed services under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 et seq., for receiving medical treatment under Executive Order 5396

(Jul. 17, 1930), and for periods during which workers compensation is received under the Federal Employees Compensation Act, 5 U.S.C. chapter 81.

(5) Each temporary employee who is initially eligible for FEHB coverage on the basis of paragraph (j) of this section is entitled to enroll in accordance with § 890.301(a). A temporary employee who is currently eligible under 5 U.S.C. 8906a (with no Government contribution) but who is not enrolled on the effective date of paragraph (j), and who would also meet eligibility requirements on the basis of paragraph (j), is entitled to enroll (with a Government contribution) on the basis of paragraph (j) in accordance with § 890.301(h)(4)(ii). A temporary employee who is enrolled under 5 U.S.C. 8906a (with no Government contribution) on the effective date of paragraph (j), and who would also meet eligibility requirements on the basis of paragraph (j), is entitled to change enrollment (with a Government contribution) on the basis of paragraph (j) in accordance with § 890.301(h)(4)(ii).

(k) The Director, upon written request of an employer of employees other than those covered by 5 U.S.C. 8901(1)(A), may, in his or her sole discretion, waive application of paragraph (j) of this section to its employees when the employer demonstrates to the Director that the waiver is necessary to avoid an adverse impact on the employer's need for self-governance.

3. Amend §890.301 by:

- a. Revising the heading of paragraph (h);
- b. Redesignating paragraph (h)(4) as paragraph (h)(4)(i); and
- c. Adding paragraph (4)(ii) to read as follows:

§890.301 Opportunities for employees who are not participants in premium conversion to enroll or change enrollment; effective dates.

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(h) *Change in employment status or entitlement to Government contribution.* * * *

(ii) A change in entitlement to Government contribution as a result of becoming eligible for coverage under § 890.102(j).

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